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No. 1197

In the
Supreme Court of the United States
OCTOBER TERM, 1965.

GAMBLE-SKOGMO, INC., a Delaware corporation,
Petitioner,

vs.

ALBERT W. GASS and GASS & SCHROEDER, INC., an Illinois corporation,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Brief in Opposition asserts certiorari is not merited because (a) there is no conflict between circuits as to what constitutes compliance with Civil Rule 51 and Criminal Rule 30 (p. 6), and (b) the generally accepted standard of compliance is that the trial court need "do no more than inform counsel generally as to its views on the requested instructions" (p. 8).

Both assertions are wrong and the case presents a grave question of fairness in a most important aspect of federal jury trials:

1. There is deep conflict in definitive pronouncements between the circuits; the decisions cannot be harmonized by treating each one as involving a unique factual situation rather than conflicting treatment of a common procedural problem. But,

2. In any event, no trial court, in any circuit, should be permitted to adopt what respondent asserts is the test—that the trial court merely "inform counsel *generally*" what it proposes to do about tendered instructions. So lax and evasive a standard would destroy the effectiveness of the Rules, endorse surprise, and make verdicts substantially dependent upon the ability of lawyers to "guess" what the trial court really meant. The entire thrust of this Court's procedural reforms has been to remove surprise from the trial process. Surprise and uncertainty as to instructions is bound to result in wrong verdicts as the Court of Appeals finds was the case here:

The trial court first made his "cryptic", "general" announcement that he was going to "enunciate the law to be as it was recently found by the 7th Circuit in the case in 285 F. 2d" (R. 446, Br. in Opp. 4). The trial court realized that this far from definitive ruling left counsel to speculate, for shortly, in telling how to object to his as yet undelivered charge, the judge warned them to listen to the charge closely:

> "The objections *are to be specific* * * *. *You will, therefore, kindly pay attention to the charge as it is being given* * * *." (Tr. 790, Br. in Opp. 5)

Plainly, if the "general" announcement was adequate advise of the court's proposed action, his warning was

unnecessary, for counsel would have known what the charge would be. In the dilemma counsel for Petitioner promptly requested "specific ruling[s] on specific instruction[s] so I can show my specific objections * * * and * * * *so I may know beforehand and can argue accordingly.*" (R. 450, Pet. p. 4, n. 4) The request was flatly denied although counsel was entitled to "know beforehand."

The Brief in Opposition seeks to enlarge the record by claiming (p. 12) that the trial court's statement that he would follow the law of Illinois, was, "in context," a reference to *Laughlin* v. *Hopkinson,* 292 Ill. 80; 126 N.E. 591 (1920), which deals with punitive damages. This is naked invention. Nothing in context so indicates. On the contrary, the *only* case the trial court referred to "in context" was the one *"in 285 F.2d"* (*Harry Alter Company* v. *Chrysler Corporation*), which reviewed the Illinois authorities and did not even mention *Laughlin* v. *Hopkinson, or punitive damages.* Certainly the conclusion of counsel for Petitioner that punitive damages were to be excluded was a fair and rational deduction even though it proved to be wrong.[1]

Of equal importance was the "context" reference to the law on the essentials of actionable fraud.[2] The trial court said that as he had "already informed" counsel,

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[1] The Brief in Opposition (p. 8, n. 1) states that Petitioner's argument did not "emphasize" punitive damages, and quotes Petitioner's single reference to the term. The footnote serves to emphasize that Petitioner's counsel did *not* argue the point.

[2] This was immediately before the defense argument, when Petitioner's counsel again pointed out that the tendered instructions were conflicting. (R. 452)

he intended to follow the law as stated "by the 7th Circuit quite recently, and also by the Supreme Court of Illinois applicable to this type of situation" (R. 452). The specific reference was to *Harry Alter* v. *Chrysler Corporation,* which unmistakably shows that Illinois requires *knowledge of falsity.* Having earlier urged counsel to reread that case (R. 446) the reference to Illinois decisions, *in context,* seemed clearly to those cases holding that scienter is a necessary element (Pet. p. 10, n. 8). Petitioner therefore argued that such *would be* the court's instructions. However, the court's charge began with a reference to the "should have known" theory of plaintiff's complaint (R. 445); in the middle, told the jury to find whether there was guilt as "charged in the complaint" (R. 460); and at the very end, by the verdict forms read and given to the jury, brought their attention back to the "should have known" language of the complaint (R. 468). Although the charge did, at one point, include a correct statement of the law, the damage was done.

Thus the case at bar illustrates the confusion almost certain to follow from the "general announcement" practice. And the Brief in Opposition points to no reason why trial judges should not follow Rule 51 and make fair and enlightening announcements as to what their charges will be.

The Brief in Opposition endeavors to harmonize all the cases, arguing: that all are concerned with their individual procedural facts; that all circuits adopt the same "general announcement" test; and that some cases hold a particular "general announcement" was "adequate" while others hold another was "inadequate." Obviously the argument is a contradiction in terms, and shows that the circuits have been applying differing and slippery standards. This Court should end the confusion.

Counsel correctly characterize as "inadequate" the methods reversed in the 6th, 9th and 10th Circuits (Br. in Opp. p. 6) but are in gross error in claiming that the cases from the 7th, 5th, 2d, 8th and 4th circuits all hold that the trial court's manner of informing counsel was "adequate" or proper. On the contrary, all the cases, save possibly *Garland* v. *Material Service Corporation,* 291 F.2d 861 (7 Cir., 1961)[3] proceeded upon the premise that the information may have been *inadequate,* but for some reason of waiver, lack of prejudicial surprise, etc., reversal was not warranted. Thus:

7 Cir: *Levin* v. *Joseph E. Seagram & Sons.,* 158 F.2d 55, 58 (1946); failure to press for definite rulings after a general announcement, so as to be in a position to "show that he was prejudiced if in fact he was."

5 Cir: *Clegg* v. *Hardware Mutual Casualty Co.,* 264 F.2d 152, 157 (1959); actually concerned with verdict forms, where there was actual argument on the questions put to the jury "this action did not precipitate any surprise."

8 Cir: *Terminal R.R. Ass'n.* v. *Staengel,* 122 F. 2d 271, 278 (1941); failure to request further argument after surprise instruction which "may be prejudicial."

2 Cir: *Gwinett* v. *Albatross S. S. Co.,* 243 F.2d 8, 9 (1957); the *record* failed to show whether the court had advised counsel, but so far as the record showed, he argued his case without requesting such information. There was "no showing of resulting prejudice."

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[3] Even this case holds that a failure to substantially comply with Rule 51 in certain circumstances might be reversible error.

4 Cir: *Hardigg* v. *Inglett,* 250 F.2d 895, 897 (1957); all the requested instructions were given except for a modification of one. Counsel took no exception. Although the Rule "is mandatory, the fact that the Court's action in this instance was not without some reason does not satisfy the requirement", but there was no material prejudice.

Respondents assert that none of the "inadequate" cases lays down a rule contrary to the 7th Circuit's ruling here, outright reversals for mere cryptic or inconclusive announcements notwithstanding. However, the decisions cannot be reconciled, in theory or in practice, with the 7th Circuit decision at bar where, after the trial court *"purposely"* ignored the Rule, the Court of Appeals, without even referring to the Rule says "the parties [were] advised."[4]

There is sharp conflict and confusion concerning the requirement of Rule 51 that counsel be informed before argument as to the trial court's proposed action on requests for instructions. The advocate's tremendous burden of intelligent, effective jury argument, *addressed to the charge,* is at issue. The counterpart provision of

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[4] Respondents say that even *Downie* v. *Powers,* 193 F. 2d 760, 766 (10 Cir., 1951), reversed for violation of the Rule, recites that a general announcement would be sufficient. There, the "general announcements" were that the court would note on each requested instruction his disposition of it, that many were approved but some were repetitious and confusing, and counsel "ought to know what the law is." The Court of Appeals said (p. 766): "it has always been considered good practice for the court to informally advise counsel before argument generally what its instructions would be on *controverted questions of law.*" And (p. 767) ". . . the Court can not act arbitrarily. It cannot assume counsel will know what the instructions will be, and Counsel is not required to speculate at the risk of having his argument nullified or its effectiveness impaired by the Court's subsequent charge to the jury."

Criminal Rule 30 is identical. In concern for all Federal jury trials, this Court should grant the writ. The chaotic and vague standards now in vogue in many circuits are no credit to the federal judiciary.

Respectfully submitted,

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